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Species Listing Moratorium Lifted - MAJ Ayres

On 10 May 96, the President waived the Congressional moratorium on listing actions under Section 4 of the Endangered Species Act (ESA). Determination of Threatened and Endangered Species, 16 U.S.C. § 1533 (1988). In response, the Director of the U.S. Fish and Wildlife Service (USFWS), Mollie Beattie, stated that the USFWS will resume listing actions. OFFICE OF PUBLIC AFFAIRS, U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR, NEWS RELEASE: CONGRESSIONAL MORATORIUM LIFTED ON ENDANGERED SPECIES LISTINGS; FISH AND WILDLIFE SERVICE SETS PRIORITIES FOR RESUMING PROGRAM (MAY 10, 1996).

In the news release, USFWS notes that a total of 243 species proposed for listing await completion of final rules; another 182 candidate species have been identified. A partial listing of these species (238 species for which proposed rules to list have been issued, and all 182 candidate species) was published in the Federal Register on 28 February 1996. Endangered and Threatened Wildlife and Plants; Review of Plant and Animal Taxa That Are Candidates for Listing as Endangered or Threatened Species, 61 FED. REG. 7596-613 (1996) (to be codified at 50 C.F.R. pt. 17). The news release also notes that, due to fiscal restraints, it is unlikely that final decisions can be made on all 243 proposed species by the end of FY96.

Installation Environmental Law Specialists (ELSs) should note several issues concerning this announcement. First, federal agencies have a legal obligation to "confer" with USFWS or the National Marine Fisheries Service (NMFS) on any action likely to jeopardize a species proposed for listing. Interagency Cooperation, 16 U.S.C. § 1536(a)(4). Second, Army Regulation 200-3 requires installations to consider candidate species in making decisions that may affect those species. DEP'T OF ARMY, REG. 200-3, NATURAL RESOURCES - LAND, FOREST, AND WILDLIFE MANAGEMENT, para. 11-4(a) (28 Feb. 1995). Last, the number of species that the USFWS previously considered as candidate species has dropped significantly.

Previously, USFWS categorized species as Categories 1, 2, or 3 with the result that approximately 1400 species were considered candidate species. In past practice, Category 1 candidates consisted of (1) proposed species, and (2) species for which the USFWS had sufficient information on file to support issuance of a proposed rule. Present practice is to term these species simply (1) proposed species, and (2) candidate species. 61 FED. REG. at 7597. Also in the past, Category 2 candidates were those species for which the USFWS had information on file to suggest that listing action was possibly appropriate; the USFWS is discontinuing the designation of these species as Category 2 species and does not regard these species as candidates. 61 FED. REG. at 7597. USFWS plans to refer to these previous Category 2 species as ***species of concern***. USFWS does not plan to take the lead in managing ***species of concern***, but requests federal and state agencies to act on their own to implement cooperative efforts that would alleviate the necessity for future listing actions. Interagency Candidate Species Coordination Meeting convened by Jay Slack, USFWS, Department of Interior, in Wash. D.C. (May 15, 1996). USFWS also clarified that

Category 3 species, species that were once considered for listing but are no longer under such consideration, are not to be considered candidates for listing. 61 FED. REG. at 7597.

1996 Texas Initiative - LTC Hunter

The DoD Regional Environmental Coordinator (REC) for Texas, the Air Force Center for Environmental Excellence (AFCEE), hosted an important environmental conference on 30 April 96 in Austin. The "Texas Initiative" accomplished three important objectives. First, the DoD REC announced the formation of the Texas Initiative Environmental Partnering Group (Partnering Group). Second, speakers from a variety of federal facilities provided updates on recent developments affecting federal facilities in Texas. Finally, a discussion session was held with the Texas Natural Resource Conservation Commission (TNRCC) which allowed senior members of the TNRCC and representatives from federal facilities in Texas to interface.

The morning session was devoted to federal facility issues, and representatives were present from all branches of DoD, as well as the Coast Guard and NASA. The Air Force's REC briefed attendees about the formation of the Partnering Group. The Partnering Group will be a centralized point of contact for resolving issues arising from new or revised legislation or regulatory initiatives. It will also work with senior members of the regulatory community to provide a network to share information and technology, as well as to reduce duplication of effort among the federal facilities in Texas.

While some organizational issues are still being resolved, the Partnering Group will consist of an executive committee and several active working groups. Working groups have already been established to address issues relating to pollution prevention, air, water, hazardous materials/waste, legal, and restoration/BRAC. Each working group has a Steering Committee comprised of representatives from the Army, Air Force, and Navy REC offices, as well as other interested members. The working groups plan to meet on an as needed basis to resolve environmental issues affecting federal facilities in Texas. If necessary, the working groups will seek legislative or regulatory changes.

The afternoon session was devoted to presentations from senior members of the TNRCC, and emphasized TNRCC's willingness to partner with federal facilities in an effort to achieve environmental compliance while keeping costs at a minimum.

The Texas Initiative signals a major change in the way federal facilities will achieve environmental compliance in Texas. The key to the new system is partnering. Federal facilities can now partner with other federal facilities to share resources and technology. They can also partner with the new Partnering Group, especially if assistance is needed at the senior levels of the regulatory community. Finally, the TNRCC has signaled a desire to partner with federal facilities in an effort to reduce litigation and compliance costs.

Fort Hood is already experiencing success in partnering with the TNRCC. The TNRCC has recognized Fort Hood's recent record of environmental success by adding it to its Clean Cities 2000 program. This program recognizes cities that have committed themselves to actively promote and implement programs that protect the environment as well as purchase recyclable materials. So far, Fort Hood is the only military installation to have been selected for the Clean Cities 2000 program.

Fort Hood is also experiencing success in negotiating settlements in cases pending with the TNRCC. As a result of partnering with state regulators, Fort Hood has resolved four cases and avoided paying out more than $210,000 in assessed fines. Fort Hood's success is based on entering into Agreed Orders wherein the state is allowed to list Fort Hood's alleged violations while

Fort Hood is allowed to assert denials. In two enforcement actions taken under the Clean Air Act, TNRCC waived the assessed fines following Fort Hood's assertion of sovereign immunity. In two RCRA enforcement actions totalling almost $170,000.00 in assessed fines, TNRCC agreed to offset the majority of the fines by permitting Fort Hood to complete a tire recycling project as a Supplemental Environmental Project (SEP). TNRCC achieves compliance and feels as though it has subjected Fort Hood to punitive expenditure, while Fort Hood can deny culpability, implement a beneficial project on post, and finance it with FORSCOM P2 funds vice scarce O&M dollars.

Army installations can copy the partnering approach of the Texas Initiative by looking for partnering opportunities in their state. Remember we are all seeking the same objective: environmental compliance at the lowest cost.

New Study Reveals Basis For State Soil And Groundwater Standards - Mrs. Greco

Since Federal activities are often bound to abide by state clean up standards, it is helpful to understand the basis for the standards to determine how flexible states may be in adjusting the standards. The General Accounting Office (GAO) recently investigated and published a report regarding the factors that states consider when establishing standards. In its report, GAO concluded that states were more likely to be flexible in adjusting soil standards than groundwater standards, and that most states base their cleanup standards on health risks posed by chemical waste exposure.

GAO's investigation found that 21 states had established either water or soil cleanup standards. Twenty of these states had based their standards on estimates of human risk from exposure to chemicals.

When evaluating whether states considered other factors in setting standards, GAO concluded that many did consider factors such as cost and technical feasibility of achieving the cleanup. Many states set their ground water standards at levels similar to the federal drinking water standards. Some states set more stringent standards.

The study raised the concern that standards should be adjusted to site-specific conditions. Although over half of the states considered site-specific factors when setting soil standards, fewer than one-fourth of the states allow this flexibility with regard to groundwater.

A copy of the report may be obtained through the U.S. General Accounting Office, P.O. Box 6015, Gaithersburg, Maryland, 20884, telephone (202) 512-6000.

The Environmental Law Forum - CPT DeRoma

The Environment Law Forum is now open on the Legal Automation Army-Wide Systems bulletin board service (LAAWS BBS). The forum is an arena for environmental law attorneys and support staff to discuss cases, issues, and other environmental law issues. Access is restricted to Army attorneys and technical personnel whose work involves issues pertaining to environmental law. Each person seeking access to the forum must have already completed the “Attorney” or "Legal Support Staff" questionnaire prior to requesting access. After completing the appropriate questionnaire, email should be sent to the forum manager (CPT DeRoma) requesting access. The LAAWS BBS may be reached via computer modem by dialing commercial (703)806-5791 or DSN 656-5791. The telecommunications configuration is 9600/2400/1200 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT 100/102 or ANSI terminal emulation.

EPA Amends 40 CFR Part 123 to Ensure Public Participation in Clean Water Act Permitting Process - CPT DeRoma

The Environmental Protection Agency (EPA) has amended 40 C.F.R. Part 123 to require all states that administer or seek to administer a National Pollutant Discharge Elimination System (NPDES) program to provide for an opportunity for state court review of the final approval or denial of permits that is sufficient to provide for, encourage, and assist public participation in the permitting process. The amended rule is a response to past instances in which citizens have been barred from challenging state-issued permits due to narrow and restrictive standing requirements under state law. The new change expands the standing of potential plaintiffs in state-permit actions to include parties facing potential injury to aesthetic, environmental, or recreational interests. As such, the rule incorporates principles of standing expressed in Sierra Club v. Morton, 405 U.S. 727 (1972); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982); and Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). The rule will apply any time a state seeks modification, revocation and reissuances, or termination of permits, as well as the initial approval or denial of permits. This change will be effective on 7 June 1996.

HWIR-media Update - CPT Anders

On 29 April 1996, EPA proposed new regulations for Resource Conservation and Recovery Act (RCRA) regulated contaminated media, which include contaminated soils, ground water, and sediments that are managed during government-overseen cleanups. In the new rule, entitled "Requirements for Management of Hazardous Contaminated Media," commonly referred to as Hazardous Waste Identification Rule for Contaminated Media (HWIR-media), EPA seeks to develop more flexible standards for wastes and contaminated media generated during cleanup activities by establishing a "bright line" for distinguishing hazardous contaminated media from non-hazardous contaminated media. Requirements for Management of Hazardous Contaminated Media (HWIR-Media), 61 Fed. Reg. 18,780 (April 29, 1996).

In attempt to provide greater flexibility to existing RCRA oversight of low-risk hazardous wastes, EPA published a proposed HWIR in 1992 that would have exempted certain lower risk wastes and contaminated media from regulation under Subtitle C of RCRA. Hazardous Waste Management System; Identification and Listing of Hazardous Waste, 57 Fed. Reg. 21,450 (May 20, 1992). The proposed rule, however, met with strong challenges from the regulated community, environmental groups and the hazardous waste treatment industry. EPA subsequently withdrew the proposed rule to develop less controversial rules for both newly generated hazardous waste and waste resulting from or contained in contaminated media during remediation actions. To address the first of these, EPA proposed the Hazardous Waste Identification Rule (HWIR-waste), which established exit levels for constituents found in low-risk solid wastes that are designated as hazardous because they are mixed with, derived from, or contain a listed hazardous waste. Hazardous Waste Management System: Identification and Listing of Hazardous Waste: Hazardous Waste Identification Rule (HWIR), 60 Fed. Reg. 66,344 (Dec 21, 1995). The Army, as DoD lead for developing comments, submitted comments coordinated by the Army Environmental Center on 22 April 1996.

The proposed HWIR-media rule would apply only to wastes and contaminated media generated during remediation activities. Key aspects of the proposed rule are as follows. First, EPA and authorized states will be granted the authority to remove low-risk contaminated media (those constituents whose concentrations fall below the "bright line") from regulation as hazardous waste from most of RCRA Subtitle C. The bright line values are not the same as the exit levels proposed in the recent HWIR-waste rule, and there are different bright lines for soil and for ground and surface waters. No bright line exists for sediments, but rather hazardous waste determinations are made site-by-site. Second, Land Disposal Restriction (LDR) treatment requirements would be

modified to exempt those media determined to be non-hazardous prior to excavation. Third, permitting procedures for those high-risk media remaining subject to RCRA will be established. This will be accomplished through Remedial Management Plans (RMPs), which are enforceable documents subject to public participation, and which EPA will require prior to management of hazardous or non-hazardous contaminated media. Fourth, the existing regulations for Corrective Action Management Units (CAMUs) would be withdrawn and replaced. Finally, the proposal would provide an exemption from Subtitle C for contaminated sediments dredged and managed according to permits issued under the Clean Water Act and the Marine Protection Research and Sanctuaries Act.

At EPA's HWIR-media public hearing on 4 June in Washington D.C., all oral commentors from the regulated community, as well as the representative from the Association of State and Territorial Solid Waste Management Officials, condemned the proposed rule's use of the "bright line" that defines, by constituent, which media are regulated and which are not. The commentors broadly favored an industry backed "unitary approach," which would exempt all cleanup wastes and contaminated media from Subtitle C if they meet certain conditions set out in a site-specific Remedial Action Plan (RAP), approved by EPA or an authorized state. Like the RMP, the RAP would be enforceable and would have to exceed RCRA's minimum public participation requirements, but would not serve as a RCRA permit since all of the remediation wastes and contaminated media would be exempted from Subtitle C. All commentors agreed that the bright line rule creates unnecessary confusion, complexity, and inflexibility and has questionable legal bases, while the unitary approach provides a flexible, simple approach to exiting contaminated cleanup media from RCRA.

While the bright line versus unitary approach issue is certainly an important one, there are other issues that could affect your remediation operations. Army comments will be submitted through the Deputy Under Secretary of Defense for Environmental Security (DUSD (ES)), who has requested initial comments during the month of June. The Army Environmental Center will collect DA comments for submission through the Assistant Chief of Staff for Installation Management to DUSD(ES) by 29 July 1996. You are encouraged to read the proposed rule and forward any comments you have to Bob Shakeshaft by mail, Commander, Army Environmental Center (ATTN: SFIM-AECECC, Mr. Shakeshaft), Aberdeen Proving Ground, MD 21010-5401; by fax DSN 584-3132 or (410) 671-3132; or by E-mail rashakes@aec1.apgea.army.mil.